

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

YURIY N. OVSEPYAN,

Plaintiff,

Case No. 2:17-cv-00010-RJB

V.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

Defendant.

ORDER REVERSING AND REMANDING DEFENDANT'S DECISION TO DENY BENEFITS

Plaintiff Yuriy N. Ovsepyan seeks review of the denial of his application for

supplemental security income (“SSI”) benefits. Plaintiff contends that the administrative law judge (“ALJ”) erred in evaluating the medical evidence, plaintiff’s testimony, and the lay witness testimony, and therefore in assessing his residual functional capacity (“RFC”). Dkt. 9 at 2. As discussed below, the Court **REVERSES** Defendant Commissioner Nancy A. Berryhill’s (“the Commissioner”) final decision and **REMANDS** the case for further administrative proceedings.

BACKGROUND

On January 10, 2014, plaintiff filed an application for SSI benefits, alleging disability as of September 15, 2008. Dkt. 7, Administrative Record (“AR”) 9. Plaintiff’s application was denied initially and on reconsideration. *Id.* After the ALJ conducted a hearing on April 29, 2015, the ALJ issued a decision finding plaintiff not disabled. AR 9-21.

THE ALJ'S DECISION

Utilizing the five-step disability evaluation process,¹ the ALJ found:

Step one: Plaintiff has not engaged in substantial gainful activity since January 10, 2014, the application date.

Step two: Plaintiff has the following severe impairments: depression, post-traumatic stress disorder, and headaches.

Step three: Plaintiff's impairments do not meet or equal the requirements of a listed impairment.²

RFC: Plaintiff has the ability to perform a full range of work at all exertional levels but with the following non-exertional limitations. Plaintiff can perform work in which concentrated exposure to loud noise, fumes, odors, dust, gases, and/or poor ventilation is not present. Further, plaintiff can understand, remember, and carry out unskilled, routine, and repetitive work and can cope with occasional work setting change and occasional interaction with supervisors. Plaintiff can work in proximity to coworkers but not in a team or cooperative effort. Plaintiff can perform work that does not require interaction with the public as an essential element of the job, but occasional incidental contact with the general public is not precluded.

Step four: As plaintiff is capable of performing past relevant work as a janitor, plaintiff has not disabled since January 10, 2014, the date the application was filed.

See AR 9-21. The Appeals Council denied plaintiff's request for review, making the ALJ's decision the Commissioner's final decision. *See* AR 1-4.³

DISCUSSION

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits if the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)).

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¹ 20 C.F.R. § 416.920.

² 20 C.F.R. Part 404, Subpart P, Appendix 1.

³ The rest of the procedural history is not relevant to the outcome of the case and is thus omitted.

1 **I. Medical Evidence**

2 Plaintiff asserts that the ALJ erred in evaluating the opinion of examining psychologist
3 Christina Diamonti, Psy.D. *See* Dkt. 9 at 3-6. The Court agrees.

4 The ALJ is responsible for determining credibility and resolving ambiguities and
5 conflicts in the medical evidence. *See Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998).
6 Where the medical evidence in the record is not conclusive, “questions of credibility and
7 resolution of conflicts” are solely the functions of the ALJ. *Sample v. Schweiker*, 694 F.2d 639,
8 642 (9th Cir. 1982). In such cases, “the ALJ’s conclusion must be upheld.” *Morgan v. Comm’r,*
9 *Soc. Sec. Admin.*, 169 F.3d 595, 601 (9th Cir. 1999).

10 In resolving questions of credibility and conflicts in the evidence, an ALJ’s findings
11 “must be supported by specific, cogent reasons.” *Reddick*, 157 F.3d at 725. The ALJ can do this
12 “by setting out a detailed and thorough summary of the facts and conflicting clinical evidence,
13 stating his interpretation thereof, and making findings.” *Id.* The ALJ also may draw inferences
14 “logically flowing from the evidence.” *Sample*, 694 F.2d at 642. Further, the Court itself may
15 draw “specific and legitimate inferences from the ALJ’s opinion.” *Magallanes v. Bowen*, 881
16 F.2d 747, 755 (9th Cir. 1989).

17 The ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted
18 opinion of either a treating or examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
19 1996). When a treating or examining physician’s opinion is contradicted, that opinion “can only
20 be rejected for specific and legitimate reasons that are supported by substantial evidence in the
21 record.” *Id.* at 830-31.

22 On May 6, 2015, Dr. Diamonti examined plaintiff and opined that plaintiff’s intrusive
23 thoughts, nightmares, anxiety, isolation, loss of appetite, despair, and hopelessness were severe

1 enough in nature to interfere with plaintiff's ability to work. *See* AR 338. Dr. Diamonti's specific
2 opinion regarding plaintiff's limitations in workplace functionality is obscured in the record. *See*
3 *id.* Still, the ALJ, without developing the record, gave little weight to Dr. Diamonti's opinion
4 because Dr. Diamonti did not realize that plaintiff was receiving treatment and because the
5 evaluation was performed for the purpose of getting state benefits. *See* AR 18. Neither of these
6 reasons is legitimate.

7 First, that Dr. Diamonti was allegedly unaware of plaintiff's therapy sessions and use of
8 medication does not negate her opinion regarding plaintiff's impairments and their impact on
9 plaintiff's ability to work at the time of the evaluation. The Commissioner argues that the ALJ
10 demonstrated that plaintiff's mood improved with treatment, but prior to the evaluation. *See* Dkt.
11 10 at 6. Therefore, even if any alleged improvement had occurred, Dr. Diamonti still found
12 plaintiff to have functional impairments, which cannot be dismissed simply because they may
13 have been more severe prior to the start of treatment. Second, absent "evidence of actual
14 improprieties," the purpose for which a medical report is obtained is not a legitimate basis for
15 rejecting it. *See Lester*, 81 F.3d at 832 ("An examining doctor's findings are entitled to no less
16 weight when the examination is procured by the claimant than when it is obtained by the
17 Commissioner."). Therefore, the ALJ erred by failing to provide a specific and legitimate reason
18 supported by substantial evidence to discount Dr. Diamonti's opinion.

19 The Ninth Circuit has "recognized that harmless error principles apply in the Social
20 Security Act context." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012) (citing *Stout v.*
21 *Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050, 1054 (9th Cir. 2006) (collecting cases)). The Ninth
22 Circuit noted that "in each case we look at the record as a whole to determine [if] the error alters
23 the outcome of the case." *Id.* The court also noted that the Ninth Circuit has "adhered to the

1 general principle that an ALJ’s error is harmless where it is ‘inconsequential to the ultimate
2 nondisability determination.’” *Id.* (quoting *Carmickle v. Comm’r, Soc. Sec. Admin.*, 533 F.3d
3 1155, 1162 (9th Cir. 2008)) (other citations omitted). The court noted the necessity to follow the
4 rule that courts must review cases “‘without regard to errors’ that do not affect the parties’
5 ‘substantial rights.’” *Id.* at 1118 (quoting *Shinseki v. Sanders*, 556 U.S. 396, 407 (2009) (quoting
6 28 U.S.C. § 2111) (codification of the harmless error rule)).

7 Had the ALJ fully credited the opinion of Dr. Diamonti, including any further specific
8 limitations in the portion missing from the record, the RFC would have included additional
9 limitations, as would the hypothetical questions posed to the vocational expert. As the ALJ’s
10 ultimate determination regarding disability was based on the testimony of the vocational expert
11 on the basis of an improper hypothetical question, the error affected the ultimate disability
12 determination and is not harmless.

13 **II. Plaintiff’s Testimony**

14 Plaintiff argues that the ALJ erred in evaluating his testimony. *See* Dkt. 9 at 9-14. The
15 Court disagrees.

16 Questions of credibility are solely within the control of the ALJ. *See Sample*, 694 F.2d at
17 642. The Court should not “second-guess” this credibility determination. *Allen v. Heckler*, 749
18 F.2d 577, 580 (9th Cir. 1984). To reject a claimant’s subjective complaints, the ALJ must
19 provide “specific, cogent reasons for the disbelief.” *Lester*, 81 F.3d at 834 (citation omitted). The
20 ALJ “must identify what testimony is not credible and what evidence undermines the claimant’s
21 complaints.” *Id.*; *see also Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). Unless
22 affirmative evidence shows the claimant is malingering, the ALJ’s reasons for rejecting the
23 claimant’s testimony must be “clear and convincing.” *Lester*, 81 F.3d at 834. That some of the

1 reasons for discrediting a claimant's testimony should properly be discounted does not render the
2 ALJ's determination invalid, as long as that determination is supported by substantial evidence.
3 *Tonapetyan v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001).

4 Here, plaintiff stated in a function report that he was not mentally stable enough to
5 perform work functions. *See* AR 197. Plaintiff alleged that headaches and pain all over his body
6 left him without the will to do anything. *See id.* Plaintiff stated that he could not hear or
7 understand commands or perform simple tasks on his own such as eating, caring for himself,
8 washing and combing his hair, shaving, brushing his teeth, or dressing. *See* AR 197-98. When
9 asked to describe what he did during the day, plaintiff stated that he sat in his room and stared at
10 the walls until someone came and brought him food. *See* AR 198. Plaintiff alleged that he could
11 walk no more than 50 feet before needing to stop and rest for ten minutes. *See* AR 202. The ALJ
12 discounted plaintiff's testimony because the alleged severity of the limitations to which plaintiff
13 testified was inconsistent with the record, particularly plaintiff's daily activities. *See* AR 14-17.

14 According to the Ninth Circuit, an ALJ may discount a claimant's testimony when the
15 claimant's daily activities "contradict his other testimony." *See Orn v. Astrue*, 495 F.3d 625, 639
16 (9th Cir. 2007). As noted by the ALJ, plaintiff's daily activities, as reported to medical providers,
17 included going on walks with a friend, going to the park with his daughter and grandson,
18 weightlifting, cooking, cleaning, grocery shopping, and laundry. *See* AR 16-17 (citing AR 251,
19 265, 294, 338). Accordingly, the ALJ found that plaintiff's impairments could be expected to
20 cause some limitations but not to the extent to which plaintiff testified. *See* AR 15. Substantial
21 evidence supports this clear and convincing reason, so the ALJ did not err here.

22 **III. Lay Witness Testimony**

23 Plaintiff argues that the ALJ erred in evaluating the lay witness testimony in the record.

1 *See* Dkt. 9 at 6-7. “In determining whether a claimant is disabled, an ALJ must consider lay
2 witness testimony concerning a claimant’s ability to work.” *Stout*, 454 F.3d at 1053; *see also* 20
3 C.F.R. §§ 404.1513(d)(4), (e). Such testimony is competent evidence and “*cannot* be disregarded
4 without comment.” *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996) (emphasis in
5 original). If an ALJ disregards the testimony of a lay witness, the ALJ must provide reasons “that
6 are germane to each witness.” *Id.* Further, the reasons “germane to each witness” must be
7 specific. *Stout*, 454 F.3d at 1054.

8 Here, the ALJ summarized the testimony of plaintiff’s daughter, Yuliya Ovsepyan, but
9 did not explain the weight assigned to her testimony in assessing the RFC. *See* AR 14. The
10 Commissioner argues that the Court should infer that the ALJ rejected Ms. Ovsepyan’s
11 testimony for the same reasons the ALJ rejected plaintiff’s testimony. *See* Dkt. 10 at 9. However,
12 as this case is being remanded for further administrative proceedings (*see infra* § IV.), the Court
13 finds that Ms. Ovsepyan’s testimony should be explicitly considered and assigned weight on
14 remand.

15 **IV. Remand for Further Administrative Proceedings**

16 Because the ALJ erred in evaluating Dr. Diamonti’s opinion, the ALJ’s RFC assessment
17 does not necessarily completely and accurately describe all of plaintiff’s capabilities. Because
18 the ALJ erred in assessing plaintiff’s RFC, the hypothetical questions posed to the vocational
19 expert at the hearing were not necessarily complete. Therefore, the ALJ’s step-four
20 determination is not supported by substantial evidence and is in error.

21 The Court may remand this case “either for additional evidence and findings or to award
22 benefits.” *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). Generally, when the Court
23 reverses an ALJ’s decision, “the proper course, except in rare circumstances, is to remand to the

1 agency for additional investigation or explanation.” *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th
2 Cir. 2004) (citations omitted). Thus, it is “the unusual case in which it is clear from the record
3 that the claimant is unable to perform gainful employment in the national economy,” that
4 “remand for an immediate award of benefits is appropriate.” *Id.*

5 Benefits may be awarded where “the record has been fully developed” and “further
6 administrative proceedings would serve no useful purpose.” *Smolen*, 80 F.3d at 1292; *Holohan v.*
7 *Massanari*, 246 F.3d 1195, 1210 (9th Cir. 2001). Specifically, benefits should be awarded where:

8 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the
9 claimant’s] evidence, (2) there are no outstanding issues that must be resolved
10 before a determination of disability can be made, and (3) it is clear from the
record that the ALJ would be required to find the claimant disabled were such
evidence credited.

11 *Smolen*, 80 F.3d 1273 at 1292; *McCartey v. Massanari*, 298 F.3d 1072, 1076-77 (9th Cir. 2002).

12 Here, issues still remain regarding plaintiff’s ability to perform past work or other jobs existing
13 in significant numbers in the national economy despite any additional assessed limitations,
14 including those to which Dr. Diamonti may have opined in the obscured portion of the record.
15 Accordingly, remand for further consideration is warranted in this matter.

16 CONCLUSION

17 For the foregoing reasons, the Commissioner’s final decision is **REVERSED** and this
18 case is **REMANDED** for further administrative proceedings under sentence four of 42 U.S.C. §
19 405(g).

20 DATED this 24th day of August, 2017.

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23 ROBERT J. BRYAN
United States District Judge